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The Judicial System of Japan

AN INTRODUCTORY HISTORICAL NOTE

THE JAPANESE legal system as it exists today is a combination of civil and common law brought about by the voluntary adoption of civil law from continental Europe and the imposition of common law on Japan after World War II.¹ The first Japanese constitution was adopted in 1889² after the revolution of 1868 by the semi-independent barons.³ The new government replaced the traditional Chinese law which had been used until then in criminal and civil matters with imported foreign law.⁴ The constitution, like the entire alteration of the Japanese legal system, was a realization that Japan had to look outside its own borders for law in order to deal and trade effectively with the western powers.⁵ The constitution⁶ was promulgated on February 11, 1889.⁷ It was heavily influenced by German and Austrian law.⁸ The authoritarian nature of German law appealed to the Japanese⁹ while the English system was felt to be too democratic for adoption by Japanese society.¹⁰

As early as 1900, however, Anglo-American common law began to make an appreciable impression on the Japanese legal system. The Jury Law of 1923, for example, introduced the jury into criminal trials.¹¹ The great common law influence was not felt, however, until the American occupation of the islands following the Second World War. Common law institutions, especially American, were

¹ R. SCHLESINGER, *COMPARATIVE LAW* 260 (1970).

² Kuribayashi, *The Japanese Legal System*, 36 *AUSTRALIAN LAW JOURNAL* 437 (1963).

³ 2 WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 520 (1928).

⁴ Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 *THE BUSINESS LAWYER* 1259 (1972). The elaborate Japanese Commercial Code which had developed as a result of internal rice trade did not need to be altered as much as the Civil and Criminal Codes. Western commercial concepts such as written contracts, holder in due course, bona fide purchaser either already existed or were closely related to pre-1868 Japanese commercial law.

⁵ WIGMORE, *supra* note 3, at 520.

⁶ The Constitution was drafted by Count Ito Hirobumi; *Id.* at 521.

⁷ D. F. Henderson, *Foreword to THE CONSTITUTION OF JAPAN, ITS FIRST TWENTY YEARS 1947-67* 6 (D. F. Henderson ed. 1968).

⁸ Kuribayashi, *supra* note 2, at 437.

⁹ Stevens, *supra* note 4, at 1260.

¹⁰ Kuribayashi, *supra* note 2, at 437. It should be noted that Japan was the first eastern country to adopt, voluntarily, western laws and legal systems. WIGMORE, *supra* note 3, at 525.

¹¹ Takayanagi, *Contact of the Common Law with the Civil Law in Japan*, 4 *AM. J. OF COM. L.* 60 (1955).

superimposed on Japanese civil law.¹² By this process some institutions, notably constitutional and administrative, were radically altered.¹³ Other areas of the law, such as the Code of Civil Procedure adopted in 1890, were left substantially intact.¹⁴

The German trained lawyer will be able to adapt more readily to the Japanese Code of Civil Procedure than his common law brethren.¹⁵ He will, however, have to learn to deal with the common law institutions; a gift of the Americans. Despite these considerations, it is safe to assume that Japan remains a civil law country. The seven year American occupation, while having profound impact on Japanese legal institutions, was far too short to turn Japan into a common law country as are India and the Philippines.¹⁶

THE JUDICIARY OF JAPAN

There exist five types of courts in Japan. "The whole Judicial power is vested in a Supreme Court and in such inferior courts as are established by law."¹⁷ The Court Organization Law of 1947 established four inferior courts — the High Court, the District Court, the Family Court and the Summary Court.¹⁸ The concept of *stare decisis* does not, as such, exist in Japan.¹⁹ As is the case in all civil law countries, a decision of a superior court is binding only on courts below it in the case concerned.²⁰

The Supreme Court

The Supreme Court consists of a Chief Judge²¹ and fourteen

¹²R. SCHLESINGER, *COMPARATIVE LAW* 257-258 (1970). Examples of such superimpositions are the guarantee of "freedom from discrimination in political, economic or social relations because of race, creed, sex, social status or family origin" (Art. 14); the right to life, liberty, and the pursuit of happiness (Art. 13); the right of all persons to be secure in their homes, papers, and effects . . . (Art. 35); and especially the fact that the judiciary is to be "independent in the exercise of their conscience and shall be bound only by this constitution and the laws." The judiciary is the final arbiter of all legal matters (Art. 76, §§ 2 and 3). This last article had the effect of abolishing administrative courts; see *Administrative Law infra* at 300.

¹³ Takayanagi, *supra* note 11, at 64. See also note 12 *supra*.

¹⁴ Kuribayashi, *supra* note 2, at 447.

¹⁵ SCHLESINGER, *supra* note 1, at 260.

¹⁶ Takayanagi, *supra* note 11, at 67-68.

¹⁷ The Constitution of Japan, Art. 76, § 1.

¹⁸ Court Organization Law of Japan (Law No. 59, Apr. 16, 1947) Art. 2 reported in 2 Eibun-Horei-Sha (hereafter EHS) AA 2.

¹⁹ Kuribayashi, *supra* note 2, at 437.

²⁰ Court Organization Law, Art. 4, 2 EHS AA 2.

²¹ Constitution, Art. 79, § 1.

other judges.²² The Chief Judge is appointed by the Emperor²³ and the Associate Justices are appointed by the Cabinet.²⁴ The judges of the Court are subject to popular review by the people in the first general election of the members of the House of Representatives²⁵ following their appointment, and again after they have served for ten years.²⁶ The judges of the Court must be at least forty years of age and only ten of the justices need be career judges.²⁷

The Court hears cases through two benches. The Grand Bench of all the justices sits only in cases of constitutional questions, cases referred to them by the petty benches, cases in which there is a split of authority among the petty benches, and in those cases where the court deems it proper.²⁸ The Petty Bench of the Supreme Court is composed of five members. It hears all other cases.²⁹

The Supreme Court as the court of last resort has jurisdiction over appeals from the High, District, Family and Summary Courts.³⁰ The Court also has original jurisdiction in certain matters prescribed by the Codes of Civil and Criminal Procedure.³¹

The Supreme Court is also vested with the power to determine the rules of procedure and practice of attorneys, the internal discipline of the court, and the administration of judicial affairs.³²

²² Court Organization Law, Art. 5, § 3, 2 EHS AA 2.

²³ Court Organization Law, Art. 39, § 1, 2 EHS AA 11.

²⁴ Court Organization Law, Art. 39, § 2, 2 EHS AA 11. The Cabinet of Japan is created by Chapter V of the Japanese Constitution. The executive power is vested in the Cabinet. The Cabinet consists of the Prime Minister, chosen from the Diet (legislature) and the other Ministers of State, a majority of which must come from the Diet. The system was modeled after the British so that the new constitution would better harmonize with the Emperor.

²⁵ The House of Representatives is the superior chamber of the bicameral Diet or legislative branch of the government. The House of Councilors is the lower chamber.

²⁶ Constitution, Art. 79, No. 2.

²⁷ Court Organization Law, Art. 41, 2 EHS AA 12.

²⁸ LAW AND JUDICIAL SYSTEMS OF NATIONS at *Japan* 7 (1970).

²⁹ *Id.*

³⁰ Kuribayashi, *supra* note 2, at 442.

³¹ Court Organization Law, Art. 7, No. 2, 2 EHS AA 3. The Code of Civil Procedure, Art. 419-2, 2 EHS LA 80, allows the Supreme Court to hear a case to decide the validity of a ruling or order of a lower court when a misinterpretation of the Constitution is involved. This type of appeal is known as a *kokoku* complaint which is an appeal against an order other than a judgment. Japanese law recognizes two other types of appeals: *koso* — appeals from a judgment appealing issues of both fact and law and *jokoku* — appeals on issues of law alone. See also Code of Civil Procedure, Arts. 360-419, 2 EHS LA 69-LA 81.

³² Constitution, Art. 77.

The High Courts

A High Court is composed of a President and the proper number of judges³³ which is usually three except in those cases dealing with internal safety, such as treason, where the number is five.³⁴ The President of the High Court is nominated by the Supreme Court and appointed by the Cabinet³⁵ for a term of ten years at the end of which reappointment is possible.³⁶ The High Courts sit in eight cities throughout Japan.

Article 16 of the Court Organization Law gives the High Court jurisdiction over the following matters:

1. Appeals (*koso*) from judgements in the first instance rendered by District Courts, from judgements rendered by Family Courts and from judgements in criminal cases rendered by Summary Courts;
2. Complaints (*kokoku*) against rulings and orders rendered by District Courts and Family Courts, and against rulings and orders in criminal cases rendered by Summary Courts except those mentioned in Article 7 item (2);³⁷
3. Appeals (*jokoku*) from judgements in the second instance rendered by District Courts, and from judgements rendered by Summary Courts, except in criminal cases;
4. Actions in the first instance relating to any of the offenses mentioned in Articles 77 to 79 inclusive of the Penal Code.³⁸

³³ Court Organization Law, Art. 15, 2 EHS AA 5.

³⁴ LAW AND JUDICIAL SYSTEMS OF NATIONS at *Japan* 8. The instances where five judges are required are detailed in Arts. 77-79 of the Penal Code of Japan, 2 EHS PA 17. See note 38 *infra*.

³⁵ Court Organization Law, Art. 40, No. 2. Judges for all other courts, District, Family, and Summary, are appointed in the same manner.

³⁶ Court Organization Law, Art. 40, No. 3, 2 EHS AA 12. Judges for the High Court can be appointed from (1) assistant judges, (2) judges of the Summary Court, (3) public procurators, (4) lawyers, (5) research officials of a court, teachers and judicial research and training institutes and (6) professors and assistant professors of legal science. See Court Organization Law, Art. 42.

³⁷ Court Organization Law, Art. 7, § 2, 2 EHS AA 3, gives the Supreme Court jurisdiction where it is prescribed specially in the Codes of Procedure. An example of such special jurisdiction is Art. 419 (2) of the Code of Civil Procedure, 2 EHS LA 80, which gives the Supreme Court jurisdiction:

Regarding a ruling or an order against which an objection is not allowed to be made, *kokoku* appeal may specially be filed with the Supreme Court only when the said decision contains misinterpretation of the constitution or any other constitutional inconsistency.

Art. 433, 2 EHS RA 92, and Art. 405, 2 EHS RA 87, of the Code of Criminal Procedure also allow similar special *kokoku* appeals to the Supreme Court where such appeals would not ordinarily be allowed where there is a violation or error in interpretation of the Constitution, a determination contrary to precedent or no precedent.

³⁸ Court Organization Law, Art. 16 (1-4), 2 EHS AA 5. See note 31 *supra* for an explanation of the types of Japanese appeals. The Penal Code, Art. 77-79, 2 EHS PA 17 specifies crimes relating to civil war, treason, and other similar offenses.

The District Courts

A District Court is usually presided over by a single judge but in certain instances it is presided over by a panel of judges.³⁹ This panel, called the Collegiate Court, is composed of three members, one of whom is the presiding judge.⁴⁰ The District Court with a total of 235 branches⁴¹ is administered by a President who is designated by the Supreme Court from among the judges of the various district courts.⁴²

The District Court is the court which comes closest to a court of general jurisdiction having jurisdiction in 1) original actions⁴³ except for crimes of treason⁴⁴ and in those cases where the amount claimed or the maximum fine to be levied is less than 300,000 yen (\$1,000),⁴⁵ 2) appeals from judgements of the Summary Court except in criminal cases⁴⁶ and 3) complaints against rulings and orders rendered in the Summary Court which are not final judgements except in criminal cases⁴⁷ and where the decision contains a misinterpretation of the Constitution.⁴⁸

The Family Courts

The Family Courts were first established in 1949 to deal exclu-

³⁹ Court Organization Law, Art. 26, 2 EHS AA 7. Examples of cases which are handled by more than a single judge are: offenses punishable by death, penal servitude for life or for a minimum period not less than one year, appeals from the Summary Courts and where the court deems it appropriate.

⁴⁰ Court Organization Law, Art. 26, No. 3, 2 EHS AA 7. Judges are appointed to the District court in the same manner as judges are appointed to the High Court; see note 36 and accompanying text *supra*.

⁴¹ LAW AND JUDICIAL SYSTEMS OF NATIONS at Japan 9.

⁴² Court Organization Law, Art. 29, No. 1, 2 EHS AA 8.

⁴³ Court Organization Law, Art. 24, No. 1, 2 EHS AA 6.

⁴⁴ Treason trials, offenses relating to civil war and other offenses of a similar nature (Arts. 77 through 79 of the Penal Code, 2 EHS PA 17) are tried in the first instance in the High Court. See High Court *supra* at 297.

⁴⁵ These claims are tried in the first instance in the Summary Court. Court Organization Law, Art. 33, No. 1, 2 EHS AA 9-10; see Summary Court *infra* at 299.

⁴⁶ Court Organization Law, Art. 24, No. 2, 2 EHS AA 6. These are called *koso* appeals. In criminal cases an appeal is taken from the Summary Court directly to the High Court. Court Organization Law, Art. 16, No. 1; see High Court *supra*. For an explanation of the different types of appeals in Japanese law see note 31 *supra*.

⁴⁷ Court Organization Law, Art. 24, No. 3, 2 EHS AA 7. These are called *kokoku* complaints. Criminal *kokoku* complaints are taken directly to the High Court; Court Organization Law, Art. 16, No. 2, 2 EHS AA 5. For an explanation of the different Japanese appeals, see note 31 *supra*.

⁴⁸ Court Organization Law, Art. 24, No. 3, 2 EHS AA 7. Where there is a misinterpretation of the Constitution the decision is directly appealable to the Supreme Court; Code of Civil Procedure, Art. 419-2, 2 EHS LA 81. For an explanation of the different Japanese appeals see note 31 *supra*.

sively with juvenile and family matters.⁴⁹ The court is independent of but equal to the District Court. The same statutes and regulations which apply to the District Court on the number and selection of judges apply to the Family Court.⁵⁰

A Family Court is a court of the first instance divided into two divisions, the family affairs division⁵¹ having jurisdiction over all matters relating to the family as provided in the law for adjudgment of domestic relations,⁵² and the juvenile division⁵³ which has jurisdiction over all matters dealing with or relating to the protection of juveniles specified in the Juvenile Law⁵⁴ and all offenses specified in the Juvenile Law.⁵⁵

The Summary Courts

The Summary Courts constitute the lowest tier of courts in Japan and they are the most numerous.⁵⁶ Each Summary Court is presided over by one judge.⁵⁷ The court has jurisdiction over claims where

⁴⁹ GUIDE TO THE FAMILY COURT OF JAPAN 1 (1957).

⁵⁰ Court Organization Law, Art. 31-4, Nos. 1 and 2, 2 EHS AA 9. A single judge usually presides except in certain instances. See District Court *supra*. In the Family Court a judge is sometimes assisted by a probation officer to handle prehearing investigation.

⁵¹ LAW AND JUDICIAL SYSTEMS OF NATIONS at *Japan* 10.

⁵² Court Organization Law, Art. 31-3, No. 1, 2 EHS AA 9. Such matters are divorce (except where the divorce is contested; in such cases an original action must be brought in the District Court), declarations of incompetence, declarations of absence or disappearance, adoption and other similar matters. GUIDE TO THE FAMILY COURT OF JAPAN 10 (1957).

⁵³ LAW AND JUDICIAL SYSTEMS OF NATIONS at *Japan* 10.

⁵⁴ Court Organization Law, Art. 31-3, No. 2, 2 EHS AA 9. Examples are acts committed by adults injurious to juveniles, violations of child welfare or labor standards, or of the school education law, seduction, and child abuse. However support is handled by an administrative agency, the Family Affairs Division and desertion would be handled in a regular criminal trial. GUIDE TO THE FAMILY COURT OF JAPAN 9, 10 (1957).

⁵⁵ Court Organization Law, Art. 31-3, No. 3, 2 EHS AA 9. Examples are minors under 20, who have committed criminal offenses. Whether a felony or not, if the juvenile is age 16 or older the judge can turn the case over to the public prosecutor for normal criminal action. In practice an administrative agency, the Child Guidance Center handles situations where the offender is under 14. GUIDE TO THE FAMILY COURT OF JAPAN 7-9 (1957).

⁵⁶ Kuribayashi, *supra* note 2, at 443-444.

⁵⁷ Court Organization Law, Art. 35, 2 EHS AA 10. Judges are appointed in the same manner as judges of the High, District, and Family Court. See High Court, *supra*; except that judges for the Summary Court can be appointed from presidents or judges of the High Court, or assistant judges, public procurators, lawyers, research officials of a court, teachers of judicial research and training institutes and professors or assistant professors of legal science. Except for presidents or judges of the High Court the position must be held for at least three years. Court Organization Law, Art. 44.

the subject matter of the action does not exceed 300,000 yen (\$1,000)⁵⁸ and in criminal offenses where the punishment is a fine or where a fine is an optional penalty.⁵⁹

Though a Summary Court has broad latitude in the conduct of trials,⁶⁰ it can not impose imprisonment as a punishment except in certain cases where such punishment is limited to three years.⁶¹ If the Summary Court deems it appropriate to impose a greater penalty the case must be transferred to the District Court.⁶²

ADMINISTRATIVE LAW

Prior to the enactment of the 1946 Constitution, Japan had a large network of less formal nonjudicial administrative agencies.⁶³ These agencies, as is true in most civil law countries,⁶⁴ were beyond the reach of review by the judicial system. Appeals from the findings of these agencies were confined to either other administrative agencies or to administrative courts.⁶⁵

Article 76 of the 1946 Constitution states:

- 1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
- 2) No extraordinary tribunal shall be established nor shall any organ or agency to the Executive be given final judicial power.⁶⁶

Doubt as to the ability of the judiciary to review the actions of administrative agencies was supposedly put to rest by the Court Organiza-

⁵⁸ Court Organization Law, Art. 33 (1) (1), 2 EHS AA 9-10. The District Court has jurisdiction over claims above 300,000 yen. See note 45 and accompanying text *supra*.

⁵⁹ Court Organization Law, Art. 33 (1) (2), 2 EHS AA 10. Other offenses subject to the jurisdiction of the Summary Courts are gambling or crimes relating to gambling (Penal Code, Art. 186, 2 EHS PA 36), theft (Penal Code Art. 235, 2 EHS PA 47), and embezzlement (Penal Code Art. 252, 2 EHS PA 49) except when the crimes are within the jurisdiction of the Family Courts. Court Organization Law, Art. 33 (1) (2), 2 EHS AA 10.

⁶⁰ LAW AND JUDICIAL SYSTEMS OF NATIONS at Japan 10.

⁶¹ Court Organization Law, Art. 33(2), 2 EHS AA 10. Examples of such offenses are breaking and entering (Penal Code Art. 130, 2 EHS PA 26), gambling or operating a gambling house (Penal Code Art. 186, 2 EHS PA 36), theft or an attempt thereof (Penal Code Art. 235, 2 EHS PA 47), embezzlement (Penal Code Art. 252, 2 EHS PA 49) and certain violations of the Second Hand Business or Pawnbroker Laws.

⁶² Court Organization Law, Art. 33(3), 2 EHS AA 10.

⁶³ Ogawa, *Judicial Review of Administrative Action in Japan*, THE CONSTITUTION OF JAPAN ITS FIRST TWENTY YEARS 1947-67 185 (D. F. Henderson ed. 1968).

⁶⁴ SCHLESINGER, *supra* note 1, at 347.

⁶⁵ Ogawa, *supra* note 63, at 185.

⁶⁶ Constitution, Art. 76, Nos. 1 and 2.

tion Law giving the Japanese judiciary final review power over administrative action.⁶⁷

These amendments and laws would appear to have put an end to agency autonomy. To a large extent administrative agencies are not as powerful as they were before the war. As in the United States, however, they are still vastly important in that they make the initial determination and resolution of cases that are within their jurisdiction. This jurisdiction ranges from plant siting⁶⁸ to child guidance⁶⁹ to anti-trust violations.⁷⁰

The autonomy of all agencies was not ended. The American influence on judicial review of administrative actions was not strong enough to overcome the years of civil law independence of agencies. The concept of Administrative Guidance⁷¹ appears to circumvent the provision in the Constitution and Court Organization Law dealing with judicial review of administrative actions. Administrative Guidance developed almost immediately after the adoption of the new Constitution. Though it eludes precise definition, in general it can be said to encompass all of the various methods by which an administrative agency can make its influence felt through "voluntary," non-authoritarian, as opposed to legal obligations.⁷² The power to do so is derived from the Japanese government's power to control foreign trade, foreign exchange, loans, anti-trust and the like.⁷³

In practice an administrative agency may issue guidance by direction,⁷⁴ request,⁷⁵ warnings,⁷⁶ suggestions,⁷⁷ or encouragements.⁷⁸ In theory no recipient of such guidance is forced to comply with it.⁷⁹ The business which ignores such guidance, however, may be the sub-

⁶⁷ Court Organization Law, Art. 3, Nos. 1 and 2, 2 EHS AA 2 provide (1) courts shall, except as expressly provided for in the Constitution of Japan, decide all legal disputes and shall possess such other powers as are specifically provided for by law, [and] (2) the provisions of the proceeding paragraph shall in no way prevent preliminary determinations by executive agencies.

⁶⁸ Ministry of International Trade and Industry (MITI).

⁶⁹ Child Guidance Center. See note 55, *supra*.

⁷⁰ Fair Trade Commission.

⁷¹ *gyosei shido*.

⁷² D. F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 201 (1973).

⁷³ Stevens, *supra* note 4, at 1264.

⁷⁴ *shiji*.

⁷⁵ *yobo*.

⁷⁶ *keikoku*.

⁷⁷ *kankoku*.

⁷⁸ *kansho*.

⁷⁹ HENDERSON, *supra* note 72, at 202.

ject of a governmental sanction in a totally unrelated field to that in which the original guidance was given. Hence, it may be unable to obtain governmental financing for necessary expansion or the necessary import quotas to carry on its business.⁸⁰

It should be noted here that Administrative Guidance does not solely consist of strong arm tactics by the government. It is part of the integral working relationship between government and business. A business which works within this relationship will find not only many of the possible roadblocks in its path removed, but also the necessary funding to ensure successful pursuit of its goals.⁸¹ Some commentators have attributed the post war success of the Japanese economy to this business-government interaction.⁸²

The Japanese judiciary has taken a hands off attitude toward Administrative Guidance. That is, as long as the sanction imposed is within the discretion of the particular agency involved, then the sanction is not illegal.⁸³ The result is that even if the agency's guidance is outside the express power of the agency, or abusive, or in error, as long as the sanction imposed for non-compliance is within the agency's power it will not be overturned by the courts.⁸⁴

Agencies, employing Administrative Guidance, can be considered therefore as a sixth level of courts in Japan.⁸⁵ They are a carry-over from pre-war civil law administrative courts, comparable to administrative courts in other civil law countries, independent of the judiciary. They must be reckoned with at the agency level with the realization that there is no recourse to other courts for review.

CONCLUSIONS

Much of the common law was assimilated after the Second World War. Today civil law still remains the dominate source of Japanese law. Certain common law institutions never really adapted to the Japanese legal system. Most notably among these is the judicial review of administrative actions implicitly contained in Article 76 of the Constitution. The doctrine of Administrative Guidance,

⁸⁰ Stevens, *supra* note 4, at 1264.

⁸¹ *Id.*

⁸² See e.g., Fujita, *Japanese Regulation of Foreign Transactions and Private Law Consequences*, 18 NEW YORK LAW FORUM 317 (1972).

⁸³ Ogawa, *supra* note 63, at 191-192.

⁸⁴ The concept goes further than any agency power in the United States. No American agency has the power to control so many aspects of the economy. Even the recent wage and price controls were legally enforced and not voluntary as in the Japanese sense.

⁸⁵ Especially the Ministry of International Trade and Industry.

however, effectively circumvents the mandate of judicial supremacy. There does not appear to be any conscious effort in Japan to eliminate remaining common law institutions. The curious balance of the two legal systems appears to be well established. It seems safe to say that in the years ahead some common law will always remain part of the Japanese legal system.

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